

# BOARD OF ZONING APPEALS

## MINUTES

6:30 PM

May 15, 2013

City Council Chambers

**MEMBERS PRESENT:** Leanne Cardoso, Bernie Bossio, Tom Shamberger, and George Papandreas

**MEMBERS ABSENT:** Jim Shaffer

**STAFF:** Christopher Fletcher, AICP

**I. CALL TO ORDER AND ROLL CALL:** Bossio called the meeting to order at 6:30 PM and read the standard explanation of the how the Board conducts business and rules for public comments.

**II. MATTERS OF BUSINESS:**

A. **Minutes for the February 20, 2013 Hearing.** Shamberger moved to approve as presented; seconded by Bossio. Motion carried 2-0 with Cardoso and Papandreas abstaining due to their absence at the meeting.

**III. OLD BUSINESS:**

A. **CU09-10 / Rocktop, LLC / 341 Chestnut Street:** Request by Joe Panico, on behalf of Rocktop, LLC, for an amendment to a previously approved conditional use petition for a "Restaurant, Private Club" at 341 Chestnut Street; Tax Map 26A, Parcel 79; B-4, General Business District. **TABLED AT MAY 2, 2013 HEARING**

Papandreas moved to remove CU09-10 from the table; seconded by Shamberger. Motion carried unanimously.

Fletcher stated that all information from the May 2, 2013 hearing was included in the meeting packet that was distributed to the Board Members. Fletcher noted additional information including a letter that Staff sent to Mr. Panico on May 3, 2013 which advised him of the Boards decision to table the request and informed him that a site visit was necessary. The site visit occurred on May 8, 2013.

Bossio recognized Joe Panico of 507 Beechurst Avenue who requested that Papandreas recuse himself due to a financial interest he has in neighboring properties and businesses that conflicts with the case and doesn't feel a decision could be made objectively.

Papandreas stated he would remain on the case unless Staff wanted him to recuse himself. He reminded the Board that the request is to extend an existing conditional use that he had offered

to recuse himself on at a prior hearing. He specified that he didn't have a financial interest when deciding on the initial conditional use, and he doesn't have a financial interest now.

Bossio asked Papandreas if he was on the Board that decided the initial conditional use request. Papandreas confirmed and noted he had offered to recuse himself because he had property located within 200 feet of the establishment. Mr. Panico did not feel it was necessary for Papandreas to recuse himself at that time.

Panico stated that he didn't feel Papandreas needed to recuse himself at that time, but wants him to recuse himself now. Panico noted that Papandreas owns the property located across the street which is in direct competition for his establishment.

Papandreas clarified that nothing has changed with his property since granting the conditional use.

Panico reiterated that he would not feel comfortable with Papandreas on the Board and would like him to recuse himself since there would still be a quorum of three people. He noted that even without a quorum, it specifies under the state code that an alternative could be brought in to make the decision if a member is required to recuse themselves.

Bossio asked Fletcher if there are alternative members to the Board of Zoning Appeals. Fletcher clarified Morgantown has not established alternate members and that he does not feel state code required alternate members but rather allowed for them.

Bossio stated that he can't force Papandreas to recuse himself and offered to postpone or table the request.

Fletcher specified that without an obvious connection or fiduciary interest, he would have to look into the relationship further prior to advising whether or not Papandreas should recuse himself.

Panico asked Papandreas if he was refusing to recuse himself. Papandreas stated there was no reason for him to recuse himself.

Panico expressed to Papandreas that he feels his position will be used against him for financial gain and if that happened there would be a personal lawsuit.

Bossio asked Fletcher if Panico should have asked for recusal prior to being taken off the table. Fletcher stated that an opportunity would not have been given to make that request.

Fletcher suggested to table the request until further research could be done to provide the information needed to reach a decision.

Panico offered to remove his request for recusal as he has been postponed three times and is ready to move forward. He felt the case should be relatively easy as it is merely extending an existing conditional use request. He stated that he is confident in his project and the remaining quorum and asked to move forward with the request.

Cardoso expressed that more information may be needed by the Board but understands that Panico needs to move forward with the request.

Bossio asked Fletcher if it was possible to postpone the case prior to the next scheduled meeting. Fletcher said that would be up to the Board.

Panico reiterated that he would like to move forward with the meeting.

Bossio asked Fletcher if there were any legal issues as he has never been threaten with a lawsuit after the refusal of a Board member to reclude themselves.

Panico clarified that the lawsuit would be personal and not towards the Board of Zoning Appeals.

Fletcher stated that he has never been in this situation but felt the Board's primary concern at this point is to have a fair and equitable hearing of the case and give the best decision based on the best information that would stand up in the event of an appeal.

Cardoso noted that Panico is concerned with an appearance of impropriety and doesn't know what the legal implications would be and an ethical standard applies to those in a quasi-judicial role.

Fletcher explained that the appearance of impropriety goes back to if there is a blatant connection or fiduciary interest, or if there is an appearance of it.

Bossio asked Shamberger for his opinion and he responded that he didn't know as he has never been in this type of situation.

Papandreas asked if it was appropriate for applicants to choose the members that sit on the Board. He noted that Board members are under the sworn obligation to make the best decisions and do the right thing. Papandreas reminded the Board that he voted in favor of the initial request.

Bossio asked Panico if he had any comments towards the request.

Panico stated he is asking to extend his conditional use to a space located in the downstairs of the building which will be joined to the hotel to be included as one package with one license. He noted that all of the guidelines have been met of the initial conditions and will continue to do so until the hotel opens and the conditions will disappear.

Cardoso asked Panico to explain the lunch condition and how he felt about the initial condition. Panico stated the initial condition was not as defined as it is being claimed and he understood it to mean that he could open on a Saturday for lunch by didn't have to be open every day of the week. He expressed it is hard to remain open in the winter with the snow and low temperatures and feels they did the best they could this past winter. Panico noted that Rocktop is more of a season establishment, whereas the hotel is being developed for a year round business.

Papandreas asked Panico if the establishment met the condition of being open no later than 1:00 AM. Panico stated they could stay open until 3:00 AM, but had to stop serving liquor at 1:00 AM.

Papandreas noted that the establishment's website states the hours are until 2AM and asked if only beer was being served after 1:00 AM. Panico confirmed.

There being no comments or questions by the Board, Bossio asked if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that Staff recommends the following conditions be included in the Board's approval of the petitioner's request to amend CU09-10:

1. That both the "Rocktop" and "Big Whiskey" establishments, for the purposes of serving lunch, shall be open by at least 11:00 AM Monday through Friday.
2. That the petitioner must maintain compliance with all supplemental regulations set forth in Article 1331.06 (27) of the Planning and Zoning Code.
3. That the establishment shall not serve liquor, including wine, later than 1:00 a.m., except on New Year's Eve.
4. That the petitioner must obtain permitting as a "restaurant" from the Monongalia County Health Department under the *Monongalia County Clean Indoor Air Regulations*.
5. That any exterior building modifications (i.e. façade, awning, etc) shall be reviewed and approved by the Downtown Design Review Committee and the Planning Division prior to building permit issuance for same.
6. That any regulated signage shall be reviewed and approved by the Downtown Design Review Committee and the Planning Division prior to building permit issuance for same.
7. That the petitioner voluntarily submit all necessary financial information to the City for the subject establishment following its first twelve (12) months of operation as a "Restaurant, Private Club" to ensure compliance with Article 1331.06 (27) (e) provisions, which requires the sale of food and non-alcoholic beverages to comprise a minimum of 60 percent of total gross sales of all food and drink items in each calendar month.
8. That the conditional use approved on December 16, 2009 under Case No. CU09-10 and the amendment granted herein are and shall remain specific to Rocktop, LLC as the beneficiary of same and may not be transferred without first obtaining approval by the Board of Zoning Appeals.

Bossio invited Panico to the podium for additional questions by the Board.

Bossio asked Panico to explain what the lunch condition placed on the original request meant to him. Panico stated that the original conditional did not clarify dates and therefore he did not think lunch had to be available daily.

Panico referred to the Staff conditions and noted it would be redundant to serve lunch daily from both the upstairs and downstairs location since the business is under one license for the state.

Bossio asked Panico when the establishment will be ready to open. Panico stated it will be ready in a month and at that time lunch will be served five days a week. However, when the hotel opens and there are no conditions then he has the flexibility to serve lunches at his discretion.

Bossio asked Panico if he anticipates any further issues with construction as mentioned by his representative. Panico did not feel that construction will be an issue and reiterated that the lunch condition was not previously defined and he didn't know that he was not in compliance since no enforcement was taken against the establishment.

Papandreas asked if all financial reports have been submitted to the City. Panico stated they would not be submitted until after the first 12 months of business.

Cardoso specified that the intent of the initial condition was for the establishment to serve lunch on a daily basis, however the language used could have been misinterpreted and was ambiguous. The intent of the initial condition was to ensure that the 60/40 was a realistic possibility for Rocktop.

Panico stated he had anticipated the hotel being opened at this point, but financial issues have occurred over the past year. He noted that private parties and banquets account for most of the business at the present time.

Bossio asked Pancio if they will meet the 60% food sales minimum on their anniversary date of June 7, 2013. Pancio said they are close but noted that if the hotel had opened as initially planned then they wouldn't have had any concerns about meeting the minimum percent in food sales.

Papandreas questioned if the restaurant is in compliance of serving liquor after 1:00 AM, as he had personally visited the establishment after that time and purchased a mixed drink.

Cardoso asked Fletcher if Board members are allowed to provide personal testimony and evidence against a case. Fletcher thought it was okay, however no receipt was provided to show as proof of purchase after the 1:00 AM deadline.

Cardoso asked Fletcher if the Planning Division knew of any noncompliance issues other than the lunch availability that was previously discussed.

Fletcher referred to the action letter dated December 18, 2009 and read the initial conditions to the Board and stated that he was unaware of any noncompliance issues.

Bossio asked Fletcher what department was responsible for implementing enforcement. Fletcher stated that the Planning Division is responsible for enforcement and reminded Bossio that the department consists of one person. Bossio asked what the process of responding to a complaint entails. Fletcher explained that the department would investigate the complaint, issue a notice, then follow up with a citation through the Police Department.

Fletcher reworded the lunch condition and read aloud to the Board which defined the availability of lunch to include Monday through Friday from 11AM to 1PM until the hotel opens to the public.

Bossio clarified that the condition is to take effect immediately for the Rocktop establishment. Fletcher confirmed and noted that the elevator was operational at the site visit.

Bossio asked Fletcher if Rocktop had ever been out of compliance. Fletcher stated there is no evidence of noncompliance.

Bossio asked if Rocktop has met the initial lunch condition on a technical basis. Fletcher identified the language in the condition as not being clear and the condition as debatable.

Shamberger moved to extend CU09-10 with revised conditions; seconded by Cardoso. Motion passed 3-1 with Papandreas voting nay.

Bossio reminded Mr. Panico that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

#### **IV. NEW BUSINESS:**

- A. CU13-06 / Blue Sky Realty / 401 Spruce Street:** Request by Lisa Mardis of Project Management Services, on behalf of Blue Sky Realty, LLC, for conditional use approval of a "Lodging or Rooming House" use at 401 Spruce Street; Tax Map 26, Parcel 91; B-4, General Business District. **POSTPONED BY PETITIONER**

Fletcher advised the Board that the petitioner had requested the Board postpone this agenda item until June 19, 2013.

- B. CU13-07, V13-04, V13-07 / Sigma Kappa Sorority / 552 North Spruce Street:** Request by Bob Lindsey of LAI Architects, on behalf of that Theta Chi Chapter House Corporation of Sigma Kappa Sorority, for conditional use approval of an "Off-Site Parking Facility" use located at 552 North Spruce Street; Tax Map 26, Parcel 240; B-1, Neighborhood Business District.

Fletcher read the Staff Report stating the petitioner seeks to renovate the existing sorority house and construct an addition, which as proposed, requires conditional use approval for off-site parking; variance relief from the minimum side setback standard; and, variance relief from the maximum building height standard. Addendum A of this report illustrates the location of the subject development site.

Concerning Case No. CU13-07 relating to the proposed conditional "Off-Site Parking Facility" use, Fletcher stated that according to the petitioner, the current number of bedrooms in the sorority house is 31. The site currently has five on-site parking stalls. The proposed renovation will increase the number of bedrooms to 39 and reduce the number of on-site parking stalls to three.

Article 1365.03(D)(1) provides that:

“For the enlargement of a structure or for the expansion of a use of structure or land there shall be required only the number of additional off-street parking and loading spaces as would be required if such enlargement or expansion were a separate new structure or use.”

Article 1365.03(E) provides that:

“Off-street parking or loading facilities in existence at the time of the effective date of this article shall not hereafter be reduced below, or if already less than, shall not be further reduced below the requirements for a similar new use under the provisions of this Code.”

Table 1365.04.01 provides the following minimum parking requirement for “Fraternity or Sorority House” uses:

Use	Minimum Off-Street Parking Requirement
Fraternity or Sorority House	1 space for each three (3) persons based upon the approved maximum building occupancy

The minimum parking requirement for the Sigma Kappa Sorority House, based on its current 31 bedrooms, is 10 on-site parking stalls. As noted above, there are currently five (5) on-site parking stalls.

The proposed enlargement/expansion of the sorority house will result in eight (8) additional beds. As Article 1365.03(D)(1) provides, the minimum parking calculation for the additional beds require at least three (3) parking stalls.

The petitioner has affirmed that the Sigma Kappa Sorority House has maintained an ongoing lease agreement with the owner of the adjoining property (Parcel 239 of Tax Map 26).

Because the proposed development program will eliminate two (2) existing parking stalls, the total number of off-site parking spaces that must be provided under this conditional use petition is five (5). The petitioner seeks conditional use approval for off-premise parking on Parcel 239 of Tax Map 26.

Concerning Case No. V13-04 relating to the maximum building height standard, Fletcher stated that Article 1345.04(B) provides that the maximum height of a principal structure shall not exceed forty (40) feet in the B-1 District.

Article 1329.02 provides the following guidance in calculating building height in feet:

“The vertical distance measured from the lot ground level to the...mean height between eaves and ridges of gable...roofs. On lots with topographic elevation changes, the lot ground level shall be construed to mean the halfway point between the highest and lowest elevations of the building footprint...”

The proposed front elevation is approximately 42.48 feet and the proposed rear elevation is approximately 40 feet. The halfway point between the highest and lowest elevations is therefore approximately 41.24 feet. As such, the petitioner must obtain a variance of at least 1.24 feet. The petitioner is requested variance relief of 1'-6”.

Concerning Case No. V13-07 relating to the minimum side setback standard, Fletcher stated that Article 1345.04(A)(3) provides a minimum side setback of three (3) feet. The petitioner's proposed development program includes a new fire/egress stair case that encroaches into the minimum side setback by 1'-4". As such, the petitioner must obtain a 1'-4" variance.

Staff recommends that the Board, without objection from members of the Board, the petitioner, or the public, combine the public hearings for the conditional use and two (2) variance petitions presented herein. However, each respective conditional use and variance petition must be considered and acted upon by the Board separately.

Bossio recognized the petitioner's representative, Bob Lindsey of LAI Architects, who concurred with the Staff report and had no additional information.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of or in opposition to the request. There being none, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed requests meet the standard criteria for conditional use and a variance respectively by reaching a positive determination for each of the "Findings of Fact" submitted by the applicant. Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Staff recommends the following approvals and related conditions for each petition:

Concerning Case No. CU13-07 relating to the conditional "Off-Site Parking Facility" use, Fletcher stated that Staff recommends approval of the conditional use with the following conditions:

1. That the off-site parking facility be encumbered by an easement or similar agreement, to the satisfaction of the Planning Division, which is duly executed and acknowledged and specifies that the land upon which the subject off-site parking facility is located is encumbered by the parking use of the subject development for no less than five (5) parking spaces. That this instrument must bind the use for the life of the sorority house use. That said instrument must be filed with the Planning Division and placed on public record in the Office of the Clerk of the County Commission of Monongalia County, West Virginia. That the Certificate of Occupancy for the subject dwelling space shall be contingent upon the continuance of said agreement and encumbrance and should said agreement and encumbrance be annulled for any reason at any time, said Certificate of Occupancy shall be revoked upon written notification by the Planning Division. That a valid and current copy of said instrument must be made available at the request of Planning Division.
2. That the proposed five (5) parking spaces shall have signs noting the sorority house for which the spaces are reserved. That such signage shall be 12 inches wide by 18 inches tall and shall be mounted between three feet and five feet above the finished surface of the parking stalls. That the text on the sign state "This space is reserved for residents located at Sigma Kappa Sorority at 552 Spruce Street only, per City Code 1365.07(D)."



Bossio asked Fletcher if the Certificate of Occupancy was being withheld for the parking only. Fletcher confirmed and stated it would be the rooms that require the parking spaces that are being withheld.

Shamberger made a motion to find in the affirmative for all the Findings of Facts for CU13-07 as revised by Staff; seconded by Cardoso. Motion carried unanimously.

*NOTE: The following Findings of Fact were included in the motion.*

Finding of Fact No. 1 – Congestion in the streets is not increased, in that:

Additional required parking will be obtained by an adjacent lot lease within an existing parking area. The location of the project site supports student housing at the edge of campus thereby reducing commute trips from housing outside the city and resultant congestion.

Finding of Fact No. 2 – Safety from fire, panic, and other danger is not jeopardized, in that:

A new fire / egress stair is incorporated in the new design of a fully sprinkled building. The petitioner affirms that the Sigma Kappa Sorority House has been utilizing the adjacent lot for parking. Therefore, the utilization of the existing parking area and related conditions should not contribute to fire, panic, or other dangers.

Finding of Fact No. 3 – Provision of adequate light and air is not disturbed, in that:

The location of the proposed off-premise parking is within an existing adjacent parking area and will therefore not affect existing light distribution or air flow conditions.

Finding of Fact No. 4 – Overcrowding of land does not result, in that:

The proposed design increases bed count from 31 to 39 posing only 8 additional occupants. The location of the proposed off-premise parking is within an existing parking area. With the exception of the minor 1'-6" building height and 1'4" side setback encroachments, the proposed renovation and addition observes remaining setback and lot coverage standards. The location of the proposed off-premise parking is within an existing adjacent parking area.

Finding of Fact No. 5 – Undue congestion of population is not created, in that:

The petitioner affirms that most of the Sigma Kappa Sorority House residents walk to the campus or utilize University or public transportation. The location of the project site supports student housing at the edge of campus thereby reducing commute trips from housing outside the city and resultant congestion. The proposed conditional off-premise parking use is within an existing adjacent parking area.

Finding of Fact No. 6 – Granting this request will not create inadequate provision of transportation, water, sewage, schools, parks, or other public requirements, in that:

Granting the requested conditional use would improve the adjacent properties by the reorganization and enclosing of the required fire stairs and improving the existing eclectic structure into a singular Architecture element. The proposed renovation and off-premise parking does not appear to require public facilities or services beyond those existing conditions.

Finding of Fact No. 7 – Value of buildings will be conserved, in that:

The existing house configuration lends to a disjointed architectural construct for the surrounding properties to experience. Granting the conditional use would allow the opportunity to extend the original design of the house covering the misguided addition of the CMU structure resulting in higher value to the Sigma Kappa Sorority House and surrounding buildings. The proposed conditional off-premise parking use is within an existing adjacent parking area.

Finding of Fact No. 8 – The most appropriate use of land is encouraged, in that:

The increase of the student population in the campus area reduces the sprawling of housing and vehicular necessity. The proposed conditional off-premise parking use is within an existing adjacent parking area.

Shamberger moved to approve CU13-07 as requested with Staff recommended conditions; seconded by Papandreas. Motion carried unanimously.

Concerning Case No. V13-04 relating to the maximum building height standard, Fletcher stated that Staff recommends that the Board grant a 1'-6" variance as requested without conditions.

Papandreas made a motion to find in the affirmative for V13-04 for all the Findings of Facts as revised by Staff; seconded by Shamberger. Motion carried unanimously.

*NOTE: The following Findings of Fact were included in the motion.*

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

Due to the lot size and building location, and the building's various rooflines that have developed over time, any improvements to the existing structure is limited to vertical expansion or coherent, architecturally pleasing rooflines.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

The Metro Property's Courtyard West building, located at 327 Willey Street, and Courtyard East building, located at 331 Willey Street have an approximate mean building height of 45 feet and 63 feet respectively and are located within the same B-1 District.

Finding of Fact No. 3 – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The existing house configuration lends to a disjointed architectural construct for the surrounding properties and built environment to experience. Granting the variance would allow the opportunity to extend the original design of the house covering the misguided addition of the CMU structure.

Finding of Fact No. 4 – The granting of this variance not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

Granting the requested variances would improve the Sigma Kappa Sorority House, adjacent properties, and built environment by the reorganization and enclosing of the required fire stairs and improving the existing eclectic structure into a singular Architecture element. The nature of the requested variance relief cannot mitigate nor contribute to existing traffic congestion.

Papandreas moved to approve V13-04 as requested with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Concerning Case No. V13-07 relating to the minimum side setback standard, Fletcher stated that Staff recommends that the Board grant a 1'-4" variance as requested without conditions.

Papandreas made a motion to find in the affirmative for V13-07 for all the Findings of Facts as revised by Staff; seconded by Shamberger. Motion carried unanimously.

*NOTE: The following Findings of Fact were included in the motion.*

**Finding of Fact No. 1** – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

Due to the lot size and building location, any improvements to the existing fire stair would be in a structural nature rather than the incorporation of the stairs into the Architectural design in a seamless expression.

**Finding of Fact No. 2** – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

Granting the request would allow the complete reconstruction and redesign of the current wooden egress stair that is in need of repair structurally and aesthetically. It appears that at least the following structures located within the same B-1 District encroach into present setback standards – 506 North High Street, 514 North High Street, 228 Prospect Street, 234 Prospect Street, 565 Price Street, and 331 Willey Street encroach into present setback standards.

**Finding of Fact No. 3** – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The existing condition of the fire stairs and current building configuration lends to an unsightly element for the surrounding properties. The new design will mask the old CMU addition and extend the roof line in the same Architectural language as the original house was designed. The State Fire Code requires the provision of fire stairs to the upper level.

**Finding of Fact No. 4** – The granting of this variance not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

Granting the requested variances would improve the Sigma Kappa Sorority House, adjacent properties, and built environment by the reorganization and enclosing of the required fire stairs and improving the existing eclectic structure into a singular Architecture element. The nature of the requested variance relief cannot mitigate nor contribute to existing traffic congestion.

Papandreas moved to approve V13-07 as requested with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Bossio reminded Mr. Lindsey that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

- C. **CU13-08 / Joseph R. Scotti / 808 Ridgeway Avenue:** Request by Joseph R. Scotti for conditional use approval for a “Class II Occupation” at 808 Ridgeway Avenue; Tax Map 25, Parcel 305; R1-A, Single Family Residential District.

Fletcher advised the Board that the petitioner had requested the Board to withdraw this agenda item and that no further action was required by the Board.

- D. **V13-12 / Double G Properties, LLC / 152 Third Street:** Request by Lisa Mardis of Project Management Services, on behalf of Double G, LLC, for variance relief from Article 1361.03 (Q)(1) as it relates to dedicating non-residential space on the ground floor at 152 Third Street; Tax Map 20, Parcel 32; R-3, Multi-family Residential District and SSOD, Sunnyside Overlay Districts.

Fletcher read the Staff Report stating that the petitioner seeks to raze a functionally obsolete and dilapidated structure to construct a “Multi-Family Dwelling” structure at 152 Third Street. Addendum A of this report illustrates the location of the subject development site.

The follow summary details the proposed development program.

- Three stories of apartments over garage parking in the basement.
- Three two-bedroom units.
- Three on-site parking spaces below the structure.

Concerning Case No. V13-12 relating to non-residential space on the ground floor, Fletcher stated that Article 1361.03(Q)(1) provides the following design and performance standards for “Street Hierarchies and Land Use”:

“Except for single and two family dwellings, buildings constructed along primary streets shall have sixty (60) percent or more of their ground floor space dedicated to retail, restaurant, office or personal service uses. Residential uses shall be permitted on the ground floor in the remaining space, but shall not enfront the primary street.”

The predominant configuration of parcels along Third Street are narrow frontages and corner parcels fronting intersecting streets (i.e. Grant Avenue), which leaves relatively constricted and disconnected opportunities of commercial storefront development.

Very few of the parcels along Third Street appear to have been “assembled” for the redevelopment of more intense mixed-uses. Even if parcels are “assembled” along Third Street, the steep grade would result in the stepping of commercial storefronts. The steep grade of sidewalks along Third Street presents accessibility challenges to commercial uses, particularly for persons with disabilities.

With the exception of corner parcels fronting Beechurst Avenue, all uses along Third Street are residential. The requirement of providing commercial space along Third Street therefore attempts to create retail activity rather than preserve or expand existing commercial uses. Given the physical constraints noted above, market absorption of commercial space along Third Street appears challenging and uncertain.

The Board has granted similar variance relief along Third Street, as requested by the petitioner, for the reasons noted above.

Concerning Case No. V13-13 relating to setbacks and encroachments, Fletcher stated that Sheet A-100 of the petitioner's development plan exhibits illustrates that the existing structure may be encroaching onto the adjoining property and the public alley right-of-way.

The following table identifies R-3 District setback requirements set forth in Article 1339.04, the petitioner's corresponding proposed setbacks, and required variances.

Setback Standard	Requirement	Proposed	Required Variance
Maximum Front	20 feet	8 feet	2 feet
Minimum Front	10 feet		
Minimum Side (alley)	7.5 feet	5 feet	2.5 feet
Minimum Side (internal)	5 feet	2 feet	3 feet
Minimum Rear*	10 feet	6 feet	4 feet

\* Reduced by Article 1361.04(3)

Concerning Case No. V13-14 relating to building materials, Fletcher stated that Article 1361.03(P) provides the following related design and performance standards for "Building Materials".

- (1) "Except for single and two family dwellings, the first two (2) floors of a building shall be constructed of natural materials. Natural materials include stone, brick, and wood siding, but do not include materials such as, or similar to, wood roof shingles, reflective glass, split faced concrete block, imitation stone, and imitation stucco or Drivit. Thirty-five (35) percent of the remaining building facade(s) on the public right-of-way or any facade(s) facing a single-family residence shall also be constructed of natural materials".
- (2) "Vinyl siding or other composite materials shall not exceed thirty-five (35) percent of a building face that abuts a right-of-way".

The petitioner seeks to utilize manufactured or cultured masonry materials and cementitious siding (i.e. Hardy Plank siding) instead of natural materials as required in the Sunnyside Overlay Districts. Because the proposed cladding does not meet the natural and composite material standards, variance relief is required. The Board has granted similar variance relief throughout the Sunnyside neighborhood recognizing the quality, durability, and reduced maintenance cost associated with these building materials.

**Concerning Case No. V13-15** relating to design and performance standards, Fletcher stated that Article 1361.03(E) provides the following design and performance standards:

"Building facades that are adjacent to public streets and/or open spaces shall have a high degree of ground floor transparency (at least sixty (60) percent)."

Article 1361.03(O)(1) provides the following design and performance standards:

"Total fenestration shall be at least fifty (50) percent for building facades facing primary streets and/or public open spaces. For the ground floor, the ratio shall be at least sixty (60) percent."

Article 1361.03(O)(6) provides the following design and performance standards:

"The majority of window openings shall be slightly recessed (4-8 inches) from the exterior building wall to create a distinct and uniform shadow line for the building's primary façade."

The front façade fenestration requirements along primary streets within the Sunnyside Overlay District are intended to accommodate commercial uses on the ground floor. Should variance relief be granted so that ground floor commercial/retail space is not required for the subject development, it is reasonable to conclude that transparency design should be scaled to better reflect residential uses.

Additionally, the mandated fenestration ratios appear to be more applicable for an urban central business district and not within a streetscape dominated by residential uses. It is the opinion of the Planning Division that the design method of achieving desired shadowing effect for windows should be flexible rather than narrowly prescriptive.

The Board has granted similar variance relief within the Sunnyside neighborhood where it agreed that commercial uses were not anticipated to positively affect neighborhood-scaled commercial activity given specific challenges of the respective sites; in this case, the steep terrain of Third Street.

Staff recommends that the Board, without objection from members of the Board, the petitioner, or the public, combine the public hearings for the four (4) variance petitions presented herein. However, each respective variance petition must be considered and acted upon by the Board separately.

Bossio recognized the petitioner Doug Shephard of 152 Third Street, who showed examples of prior projects at 116 Third Street and 244 McClane Avenue to display how the properties had been redeveloped with additional parking and 8 foot sidewalks which improved the safety of the area. Shephard referred to a picture that included the rear of 244 McClane Avenue to show how the space has opened up with the work of other developers. He noted that a turning diagram was submitted to the Planning Department and new storm drains have been installed.

Shephard explained he has plans to raze the existing building and provided an illustration of the lot coverage for the property to show a reduction in the current proposed plan. He noted that a 4 story apartment building was initially proposed, but they took a story off so the height would be comparable to the surroundings. He noted that Michael Mills is the designer for the project who specializes in restoration and preserving the neighborhoods while providing new buildings. Shephard explained that his buildings are new but are designed to fit into the Sunnyside Neighborhood District.

Shephard referred to Bill Burton's email that was sent to Staff with questions on the variances requested. Fletcher noted that the email was not included in the packet but was handed out to the Board members at the beginning of the meeting.

Shephard addressed the questions by Burton, stating his costs are not low as they use concrete and the buildings are constructed to lead specifications with a high energy efficiency. He noted that parking will be provided underneath the building with an adequate turning facility and green space will exist in the front area.

Shephard then addressed comments provided to Staff by Don Corwin and stated that a zero lot line is inaccurate and felt that he has due process and the right to present their case. He noted

that when Sunnyside was developed, hardy point and stone veneers didn't exist. He mentioned that good brick layers are almost non-existent and is a lost skill in the art of construction. Shephard stated that the buildings are consistent with area surroundings, he is not privately funded and is trying to improve Sunnyside with his own personal money.

There being no further comments or questions by the Board, Bossio opened the public hearing asking if anyone was present to speak in favor of the request.

Bossio recognized David Friend of Third Street who stated that Mr. Shephard's project will improve the neighborhood and he is in favor of the request.

Bossio recognized Joe Panico of 507 Beechurst Avenue who stated he is in favor of the request and noted the request is tailor made for a variance request. The request that is being made has been approved multiple times with prior petitioners in order to meet the guidelines of the Comprehensive Plan. Panico expressed that the ordinances should be changed to reflect the intention of the Comprehensive Plan which would reduce the amount of variance requests within the City.

Bossio asked if anyone was present to speak in opposition to the request.

Bossio recognized Don Corwin of 251 Beechurst Avenue who stated that Wincor Properties owns the property adjacent to the proposed project. He noted that Shephard does quality work and supported a previous development but cannot accept the setbacks that are being proposed. Corwin specified that the project will have a substantial impact on his property and asked for additional time to review the request before the Board makes a decision.

Corwin referred to the aerial photography of the site and noted the illustration is approximately three years old in which many changes have occurred during that time. He also noted that the Staff report refers to removing a functionally obsolete and dilapidated structure, however that structure was recently occupied by tenants. Corwin stated that Wincor Properties had purchased older houses on Grant Avenue and has made substantial investments in improving the community. He expressed disagreement in razing older structures and feels the neighborhood has characteristics, history and culture that needs to be preserved.

Corwin reiterated the proposed building is too tall relative to the structures in the area and the setbacks are unacceptable. He expressed the proposed project will diminish the value of surrounding properties and will obstruct site lines and omit green space. He indicated his company is penalized with guidelines and specifications for trying to preserve older homes by the City more so than others that are building newer structures. He noted that higher density is good but places more burdens on other developers as insurance rates would increase. He expressed concerns with the parking and the direction that Sunnyside is headed with building houses on smaller lots and does not feel it fits with the character of the neighborhood.

Bossio asked Corwin why he opposed the setbacks. Corwin specified that the setbacks are too tight and believes there will be one point of egress that will encroach onto his property when exiting.

Bossio recognized Mr. Shephard for an opportunity of rebuttal who reminded the Board the structure is within the requirements and is reducing the size of the structure by 22% which allows for green space. He noted the ingress and egress is an internal stair way that will exit

directly to Third Street. Shephard clarified that no height will be coming off of Grant Street, as his building is on Third Street. He noted that Corwin's properties are all three stories tall and his structure will be the same at three stories tall. He feels the character of the neighborhood is a personal opinion and would rather see safe, quality well built homes within the neighborhood. Parking will be provided onsite and the structure will help clean up the appearance of Third Street.

There being no further public comments, Bossio declared the public hearing closed and asked for Staff recommendations.

Fletcher noted to the Board that an email in favor of the request by Andrew Smith was included in the meeting packet.

Fletcher stated that the Board of Zoning Appeals must determine whether the proposed requests meet the standard criteria for a variance by reaching a positive determination for *each* of the "Findings of Fact" submitted by the applicant. Addendum B of this report provides Staff recommended revisions to the petitioner's findings of fact (deleted matter struck through; new matter underlined).

Again, each respective variance petition must be considered and acted upon by the Board separately.

Staff recommends that the petitioner's variance requested be approved with the following conditions for each respective petition:

Concerning Case No. V13-12 relating to non-residential space on the ground floor, Fletcher stated that Staff offers not recommended conditions.

Papandreas made a motion to find in the affirmative for V13-12 for all the Findings of Facts as revised by Staff; seconded by Shamberger. Motion carried unanimously.

*NOTE: The following Findings of Fact were included in the motion.*

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

Currently, there are no mixed-use or commercial uses on Third Street or in the immediate vicinity. While the Planning and Zoning Code states that Third Street is a "Primary Street," lack of pedestrian traffic, terrain, and an abundance of small or non-conforming parcels (square-footage) do not allow for the required parking that would be needed for commercial use. Further, the Code does not recognize site constraints associated with the steep terrain of Third Street. Overbuilding commercial space could result in absorption rates that do not meet conventional development financing standards. High vacancy rates in these areas do not meet market needs in terms of location and square footage. As WVU continues to increase enrollment, it can be anticipated that more and more students will be looking for affordable housing in the Sunnyside area. Allowing residential use on the first floor would encourage development and provide a more reliable source of income than the potentially vacant storefronts required by the Planning and Zoning Code.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:



The City's Planning and Zoning Code, relative to the Sunnyside Overlay Districts, does not reflect realistic opportunities and constraints. The requirement of providing commercial space along Third Street attempts to create retail activity rather than preserve or expand existing uses.

Currently, there are no mixed-use or commercial uses located on the steep terrain of Third Street. Furthermore, nonconforming small parcels negate the ability to provide required parking on site. Historically within the area, mixed-use and commercial uses have been limited to University and Beechurst Avenues.

The developer, in June of 2011, was approved for the same request at 116 Third Street, and Friend Properties was approved at 146 Third Street in September of 2012

Finding of Fact No. 3 – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The redevelopment of this property without the non-residential component will not harm this or surrounding properties in the vicinity as there currently are no examples non-residential uses located on Third Street. The potential to increase desirable student housing should serve to improve the area by inspiring further development and the removal of blighted properties. The physical constraints, such as the steep grade and small parcels, make market absorption of commercial space along this primary street challenging and uncertain.

Finding of Fact No. 4 – The granting of this variance not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

Many conditionally permitted land uses in the R-3 District have a higher traffic count than the proposed residential use. Redevelopment without the non-residential component will not increase traffic congestion or alter land-use characteristics since there are no commercial uses on Third Street or in the vicinity. The physical constraints, such as the steep grade and small parcels, make market absorption of commercial space along this primary street challenging and uncertain.

Shamberger moved to approve V13-12 as requested with Staff recommended conditions; seconded by Cardoso. Motion carried unanimously.

Concerning Case No. V13-13 relating to setbacks and encroachments, Fletcher stated that Staff recommends the condition that, to the satisfaction of the City Engineer, adequate ingress/egress maneuvering for the vehicles parking in the garage must be demonstrated prior to the issuance of a building permit.

Papandreas made a motion to find in the affirmative for V13-13 for all the Findings of Facts as revised by Staff; seconded by Shamberger. Motion carried unanimously.

*NOTE: The following Findings of Fact were included in the motion.*

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The subject parcel is considered to be nonconforming due to: (1) Its approximate area of 1,740 square feet, which is less than half of the minimum lot size standard of 4,000 square feet in the R-3 District; and, (2) Its approximate frontage of 29 feet, which is 11 feet less than the minimum lot frontage standard of 40 feet in the R-3 District. Additionally, the parcel's frontage is angled following the geometry of Third Street and also includes an recess along the interior side property boundary.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

It appears that nearly all structures on Third Street have a covered front porch that sets as close, or closer to the front setback as the proposed. Other structures appear to have similar front, side, and rear setbacks as the proposed development. The existing structure encroaches into adjacent property and the City right-of-way, and does not meet setback requirements. Mr. Sheppard has received like variances at 116 Third Street and on McLane Avenue, and Friend Rentals received like variances at 146 Third Street

Finding of Fact No. 3 – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The redevelopment of this parcel will result in the removal of a functionally obsolete and dilapidated structure with nonconforming setbacks that encroach into the City's right-of-way and adjacent property. A front setback variance will keep with the established building line of adjacent properties and will not harm this property or vicinity improvements. The petitioner affirms that no significant grading will be necessary that would harm the adjoining property, public rights-of-way, or existing utilities. The variance should not affect emergency or service vehicle access to adjacent properties.

Finding of Fact No. 4 – The granting of this variance not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The redevelopment should enhance the value of the area and accordingly contribute to the market value of neighboring structures. Granting this variance cannot improve nor mitigate traffic congestion that is already present within the neighborhood. Likewise, the approval of this variance would have no adverse impact on the land-use characteristics of the vicinity or zoning district.

Cardoso moved to approve V13-13 as requested with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Concerning Case No. V13-14 relating to building materials, Fletcher stated that Staff recommends the following conditions:

1. That exterior stairs, steps, landings, porch decking, railings, and support members may not be comprised of exposed wood or treated lumber.
2. That all exposed foundation walls and first floor exterior walls must be clad in brick as illustrated on the petitioner's elevation renderings.

3. That the above foundation and first floor exterior walls must be clad in cementitious siding comprised of a simulated wood grain profile.
4. That the garbage coral must be constructed of masonry materials with an opaque gate and the exposed exterior walls of said coral must be clad in brick to match the principal structure.

Papandreas made a motion to find in the affirmative for V13-14 for all the Findings of Facts as revised by Staff; seconded by Shamberger. Motion carried unanimously.

*NOTE: The following Findings of Fact were included in the motion.*

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The Design Professionals have actively attempted to incorporate architectural designs that are fitting with the character of the area and are durable in a predominantly student-rental environment. The ground and first-floor levels will be made of brick and remaining comprised of cementitious siding. The structure has been designed to incorporate many required design elements of the Sunnyside Overlay Districts.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

The Planning and Zoning Code states that natural materials are required on the first two floors of the proposed building. The proposed development would utilize brick on the ground and first-floor levels, similar to the previous developments by Mr. Sheppard. The proposed development also intends to utilize material that has been approved by the BZA in other Sunnyside Overlay District developments include 116 and 146 Third Street.

Finding of Fact No. 3 – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

Incorporating hardiplank, brick, and other materials in the proposed project will not be harmful to the public welfare or other improvements in the vicinity. The more durable products will last longer and need less maintenance than natural materials. The proposed building will improve the vicinity and hopefully spark future redevelopment in a somewhat blighted area on a primary street.

Finding of Fact No. 4 – The granting of this variance not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

Granting a variance for building materials cannot add to or mitigate traffic congestion on public streets. The proposed land use and proposed building materials are within the fitting character of the existing and neighboring. Market values of adjacent properties should increase with the proposed development and perhaps spark additional development in the area.

Papandreas moved to approve V13-14 as requested with Staff recommended conditions; seconded by Cardoso. Motion carried unanimously.

Concerning Case No. V13-15 relating to design and performance standards, Fletcher stated that Staff recommends the condition that all windows on the front façade facing Third Street and side façade facing the adjoining alley must include lintels, trim, and sills to provide a frame and desired shadowing effect.

Cardoso made a motion to find in the affirmative for all the Findings of Facts as revised by Staff; seconded by Shamberger. Motion carried unanimously.

*NOTE: The following Findings of Fact were included in the motion.*

Finding of Fact No. 1 – There are exceptional or extraordinary circumstances or conditions applicable to this property or to the intended use, that generally do not apply to other properties or uses in the same vicinity, because:

The mandated fenestration ratios appear to be more applicable for an urban central business district and not within a streetscape dominated by residential uses. Since Third Street is not currently conducive to commercial uses, the existing architectural style prevalent in the area does not permit the use of the required 60% of ground floor transparency. By permitting a reduced ratio, it would better reflect the existing and desired built environment and provide greater design flexibility.

Finding of Fact No. 2 – The variance is necessary for the preservation and enjoyment of a substantial property right that is possessed by other properties in the same vicinity and zoning district, but which denied to this property, because:

It appears that most other structures within the vicinity and Sunnyside Overlay Districts do not meet the required 60% ground floor transparency for the front facade as set forth in the Planning and Zoning Code. Area redevelopment, such as Friend Rentals on Third Street, as well as two other developments belonging to Mr. Sheppard on Third Street have each received the same variance being proposed.

Finding of Fact No. 3 – The granting of this variance not be harmful to the public welfare and will not harm property or improvements in the vicinity and zoning district in which the subject property is located, because:

The proposed structure will have transparency fitting with the architectural design of the surrounding built environment.

Finding of Fact No. 4 – The granting of this variance not alter the land-use characteristics of the vicinity and zoning district, or diminish the market value of adjacent properties, or increase traffic congestion on public streets, because:

The approval of this variance cannot add to or mitigate traffic congestion on public streets. The proposed variance will not diminish market values of the area, but should increase the values of surrounding properties and spark additional redevelopment.

Papandreas moved to approve V13-15 as requested with Staff recommended conditions; seconded by Shamberger. Motion carried unanimously.

Bossio reminded Mr. Shephard that the Board's decision can be appealed to Circuit Court within thirty days and that any work related to the Board's decision during this period would be at the sole financial risk of the petitioner.

**V. OTHER BUSINESS:**

**A.** Public Comments (matters not on the agenda): None.

**B.** Staff Comments: None.

**VI. ADJOURNMENT: 8:30 PM**

MINUTES APPROVED:

July 17, 2013

BOARD SECRETARY:

  
Christopher M. Fletcher, AICP